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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1019

ANTHONY JOSEPH GARGOTTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The first opinion of the court of appeals is reported at 476 F.2d 1069. After a remand by the court of appeals, the district court conducted an evidentiary hearing and issued a written order and findings of fact (Pet. App. 67a-70a). The court of appeals affirmed the district court's order (Pet. App. 134a-138a; 510 F.2d 409).

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1974, and a petition for rehearing *en banc* was denied on January 15, 1975 (Pet. App. 139a). The petition for a writ of certiorari was filed on February 14, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether state officers violated the Fourth Amendment by seizing petitioner's gambling records during the course of an arson investigation in a building owned by him that had burned.

2. Whether agents of the Internal Revenue Service were required to obtain a warrant before examining and copying the gambling records while they were in the possession of the local police.

3. Whether introduction of the gambling records as evidence at petitioner's trial violated his Fifth Amendment privilege against self-incrimination.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on thirteen counts of filing false wagering excise tax returns and two counts of failing to file such returns, in violation of 26 U.S.C. 7201. He was sentenced to a five-year term of imprisonment on each count, the sentences to run concurrently. On appeal, the court of appeals, while

generally upholding the search and seizure of petitioner's gambling records (of which more hereafter), remanded the case to the district court for a limited evidentiary hearing in regard to one aspect of the search. The hearing was held on October 25, 1973 (Pet. App. 70a-133a). On November 30, 1973, the district court issued a written order and found facts supporting the conclusion that, given the exigencies of the situation, the warrantless seizure of petitioner's gambling records was lawful (Pet. App. 67a-70a). In light of the district court's findings, the court of appeals affirmed petitioner's convictions (Pet. App. 134a-138a) and subsequently denied a petition for rehearing (Pet. App. 139a).

As set forth in the first opinion of the court of appeals (476 F.2d at 1010-1012), the evidence at trial showed that petitioner owned a three-story building in Louisville, Kentucky. The first floor housed a movie theater; the second and third floors were used for a gambling operation where bets were taken on horse races and other sporting events. At approximately 8:00 a.m. on March 22, 1969, a fire was discovered in petitioner's building, and a number of units of the Louisville Fire Department responded to the alarm. At approximately 8:20 a.m., the commanding officer at the fire, suspecting arson, called Lieutenant William Foushee, an arson investigator, and requested him to come to the scene. Foushee arrived 25 to 30 minutes later. At that time the fire appeared to have been extinguished, but the

equipment and fire fighters were still on the scene, and firemen continued to work inside the building.

Shortly after his arrival, Foushee noticed Detective John Aubrey of the Intelligence Division of the Louisville Police Department (who had seen the fire on his way to work), and requested his assistance in the arson investigation. Having been advised that the fire originated above the first floor, Foushee and Aubrey went to the second floor. It was immediately obvious to them that there were numerous separate and unrelated fires. As they reached the top of the front stairway, they found sharp burn patterns, indicating that some flammable liquid had been used to set the fire. In at least one room on the second floor and also on the third floor, trash appeared to have been set on fire. As the court of appeals described the ensuing events:

> The two investigators noticed a number of papers scattered on the floor of both the second and third floor rooms. Some of the papers appeared to have been scattered out on the floor by the stream of water from hoses of the firemen and these were placed in a fire fighter's coat which was spread on the floor. In addition to the papers on the floor, Lieutenant Foushee directed Detective Aubrey to remove papers from cabinets which were located in the various rooms on the second and third floors. The papers from the different rooms were commingled, and those taken from the cabinets were commingled with the papers picked up from the floor. Although some of the papers were wet and a few were scorched, there was no evidence that flammable

> liquids or other fire accelerants had been applied to any of the papers which were collected by the investigators. Lieutenant Foushee said that he realized the papers were records of some sort but that he did not take the time to study them that day. Detective Aubrey said that he thought he recognized the papers as containing betting records, but that he did not advise Lieutenant Foushee of this. * * * [476 F.2d at 1011.]

Foushee testified at trial and at the evidentiary hearing that the records were seized as possible evidence of motive and identity of the arsonist (I Tr. 78-79, 81; Pet. App. 73a-74a)[1]: "Since we were unaware at this point as to who may have set the fire or what might be behind this setting of the fire I felt it necessary to remove any evidence that we could find, which included records" (I Tr. 81). He further testified at the evidentiary hearing that the drawers to the file cabinets on the second floor were open when he arrived there and that they had probably been opened by the firemen during their "overhaul" procedures (Pet. App. 87a-89a).[2]

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[1] References to the trial transcript are to volume and page. References to the proceedings at the evidentiary hearing on remand are to petitioner's appendix, filed in this Court.

[2] He explained that "overhaul" involves the steps taken after a fire has been extinguished to prevent further outbreaks of fire. It involves such things as pulling ceilings down, opening walls, and opening and checking other areas (such as closets, desks, cabinets and books) where sparks or hot spots might still exist. During this process, firemen often take flammable debris, including papers and records, out of the building and hose them down with water (Pet. App. 86a-90a).

All of the records taken from the second and third floors[3] were bundled up in a fire fighter's coat and taken by Foushee and Aubrey to Aubrey's office at police headquarters. There the two investigators looked at the papers briefly (Aubrey noticing again that they were betting records) and locked them in a room. Foushee then returned to the scene of the fire. Later that afternoon a suspect other than petitioner was arrested and charged with arson. Foushee never examined the papers to determine whether they might furnish evidence of a motive for the fire.

On the day after the fire, Aubrey called an agent in the Intelligence Section of the Internal Revenue Service and advised him that he might be interested in looking at the records. Two agents of the Internal Revenue Service thereupon contacted Foushee and received his permission to examine the records. The next day they went to Aubrey's office and microfilmed the records.

About one week after the fire, and several days after the IRS inspection, the records were delivered to the office of the Commonwealth Attorney, where petitioner appeared and demanded their return.[4]

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[3] Foushee testified at the evidentiary hearing that he did not recall a filing cabinet on the third floor and that the records taken from the third floor had all been lying on the floor (Pet. App. 90a).

[4] Although petitioner had been at the scene of the fire, he had not been informed that papers had been removed from the second and third floors (I Tr. 85).

ARGUMENT

1. Petitioner contends (Pet. 6-13) that the warrentless seizure of his gambling records was not justified by the "plain view" exception to the Fourth Amendment's warrant requirement. He argues that under a portion of the opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464-473, representing the views of four of the nine members of the Court, there are three requirements for the plain view exception: a right to be in the place from which the seizure is made; an inadvertent discovery of the evidence seized; and a discovery of evidence that is incriminating. While petitioner concedes, as he must, that the first requirement is met because the initial entry into his building was justified by the fire (Pet. 12),[5] he nevertheless argues that the discovery of the records was not inadvertent (Pet. 7-8) and that—because the officers did not know the papers seized were gambling records—the evidence was not incriminating to

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[5] Under the relevant statutes of the Commonwealth of Kentucky, Lieutenant Foushee, as an arson investigator for the fire department, had the duty and the power to enter petitioner's building to investigate the cause and circumstances of the fire for the purpose of detecting arson and related offenses. Ky. Rev. Stat. §§ 227.220(2)(a), 227.240 (1973 Repl.). No warrant is required in such circumstances since "[t]he need to investigate promptly for the cause of the fire is very much interrelated with the necessity of suppressing the blaze." *Steigler* v. *Anderson*, 496 F.2d 793, 797 (C.A. 3). See also, *Bailey* v. *People of the State of Michigan*, 493 F.2d 1218, 1220 (C.A. 6), certiorari denied, 419 U.S. 858; *United States* v. *Green*, 474 F.2d 1385, 1389 (C.A. 5), certiorari denied, 414 U.S. 829.

petitioner within the meaning of *Coolidge* (Pet. 8-12).

Petitioner's characterization of the activities of Foushee and Aubrey as a "'planned' warrantless search" (Pet. 8), rather than an inadvertent discovery of evidence, is misleading. The investigators did not enter the building for the purpose of searching for and seizing gambling records or any other papers (I Tr. 127-128). Indeed, there is nothing to indicate that they were aware of the presence of any papers in the building until after they had entered the second floor room and saw papers strewn over the floor. Having properly entered the building, the investigators discovered evidence of arson, which justified their further immediate investigation for the possible causes of and motive for the arson. During this legitimate investigation, the records on the floors and in the partially opened drawers of cabinets were "inadvertently" observed in open view and were therefore properly seized.*

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* The record in the present case demonstrates that there were exigent circumstances (see, *e.g.*, *Warden* v. *Hayden*, 387 U.S. 294, 298) justifying the warrantless entry of the building and the subsequent warrantless search for evidence of arson and seizure of petitioner's records.

As the investigators reached the top of the stairway leading to the second floor they found physical evidence in the nature of sharp burn patterns which indicated that the fire had been set by a flammable liquid. Further evidence of arson was indicated by the separate trash fires set on the second and third floors. Upon entering a second floor room the investigators noticed papers strewn on the floor, apparently scattered about by the hose streams (Pet. App. 87a). On the basis of his experience as an arson investigator, Foushee realized that such

The "inadvertence" requirement announced in *Coolidge* was intended to prevent police from using the "plain view" doctrine as a method of seizing evidence that, prior to the entry, they knew was on the premises. Thus, the plurality opinion in *Coolidge* states: "where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it," there is no reason why they should not be required to obtain in advance a search warrant for that particular evidence. 403 U.S. at 470. By contrast, the officers here did not know of the existence of the gambling records before they properly entered petitioner's building, and petitioner has not argued otherwise. Their discovery of this evidence therefore was "inadvertent."

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papers and records are often evidence of a motive to commit arson. Assisted by Aubrey, he therefore collected the papers on the floor and those contained in the file cabinets, whose drawers had been opened by the firemen in their search for "sparks" and "hot spots" (Pet. App. 73a-74a, 87a-89a). Foushee testified that it was necessary to seize the papers immediately in order to prevent their destruction by the firemen according to their normal procedures (Pet. App. 89a-90a). In fact, some of the papers were already wet and scorched (Pet. App. 91a, 116a).

Foushee thus had cause to believe that arson had been committed, and his experience as an arson investigator led him reasonably to believe that the records were evidence of the crime. Cf. *United States* v. *Walling*, 486 F.2d 229, 236 (C.A. 9), certiorari denied, 415 U.S. 923. Given the existence of these exigent circumstances, it was unnecessary and indeed, would have been unreasonable, for Foushee to have attempted to stop the firefighting operations to secure a warrant. See *Warden* v. *Hayden, supra; Schmerber* v. *California*, 384 U.S. 757, 770-771.

Petitioner also argues that because the officers did not know that the papers were gambling records, the papers were not incriminating and therefore could not be seized under the "plain view" exception. But this suggests that an otherwise lawful seizure of evidence believed relevant to one offense—here arson—is transformed into a violation of the Fourth Amendment if it later turns out that the seized evidence incriminates the defendant in regard to a different offense. This Court has never adopted such a rule, and petitioner offers no reason why it should. "[A] search is not to be made legal"—or illegal—"by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States* v. *Di Re*, 332 U.S. 581, 595. In this case, the officers reasonably believed that the records could be evidence of arson—the crime under investigation—and they were therefore justified in seizing them. See *Steigler* v. *Anderson*, *supra*, 496 F.2d at 795-796; *United States* v. *Green*, *supra*, 474 F.2d at 1389. Moreover, as we pointed out above (note 6, *supra*), it was necessary to take custody of the papers immediately in order to prevent their possible destruction by firemen following normal procedures (some of the papers were already wet and scorched).

2. Petitioner contends (Pet. 13-22) that agents of the Internal Revenue Service had to obtain a search warrant before looking at the records being held by the local police and that their failure to do so constituted an unreasonable search.

As we have demonstrated, petitioner's records were lawfully seized by Foushee and Aubrey. The retention of the records and their transmission to another law enforcement agency did not constitute a separate search or seizure requiring the demonstration of probable cause or the acquisition of a warrant as a condition precedent.[7] No greater or additional intrusion on petitioner's privacy occurred when the Internal Revenue agents examined the records. Nor is there any indication in the record that the actions of Foushee and Aubrey, in investigating the arson and seizing possible evidence of that offense, were merely a subterfuge to search for evidence of illegal gambling operations (I Tr. 127-128). See *Gurleski* v. *United States*, 405 F.2d 253, 258 (C.A. 5), certiorari denied *sub nom. Smith* v. *United States*, 395 U.S. 977. Thus, as the court of appeals correctly held (476 F.2d at 1014):

> Evidence legally obtained by one police agency may be made available to other such agencies without a warrant, even for a use different from that which it was originally taken. *Gullett* v. *United States*, 387 F.2d 307 (8th Cir. 1967), cert. denied, 390 U.S. 1044, 88 S.Ct. 1645, 20 L.Ed. 2d 307 (1968).

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[7] Even assuming *arguendo* that probable cause was required, Detective Aubrey did have cause to believe that the records seized were gambling records and thus constituted evidence of possible violations of Ky. Rev. Stat. §§ 436.440 and 436.490 (1969) (repealed July 1, 1974), which made it unlawful to keep premises where wagering on horse races is done and to engage in the business of accepting such wagers.

See also *United States* v. *Coronna*, 420 F.2d 1091 (C.A. 5); *United States* v. *Scolnick*, 392 F.2d 320 (C.A. 3), certiorari denied *sub nom. Brooks* v. *United States*, 392 U.S. 931.[8]

3. Petitioner also contends (Pet. 22-28) that even if his gambling records were lawfully seized, the records were testimonial in nature and therefore barred from production at trial by his Fifth Amendment privilege against self-incrimination.

The Fifth Amendment's command that "[n]o person * * * shall be *compelled* in any criminal case to be a witness against himself" (emphasis supplied) pro-

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[8] Petitioner (Pet. 15-17) cites *United States* v. *Birrell*, 470 F.2d 113 (C.A. 2)—which was "determined on its peculiar facts" (470 F.2d at 117)—as standing for a contrary rule. In that case, state officers removed certain papers from an apartment whose occupant had been murdered. Shortly thereafter Birrell notified the police that the papers were his and demanded their return. Before the police had returned the papers, federal officers requested and were granted permission to examine Birrell's papers in connection with a perjury investigation of him. The court held that although the police were justified in retaining Birrell's papers for a reasonable time, "Birrell had sufficiently manifested his claim that a search by law enforcement officers of another sovereign for a different purpose could not be made without a warrant." *Ibid.*

However, the court recognized that if the police, on their own initiative, had given the papers to the federal officers "there would have been no federal seizure" and a different result might be reached. *Ibid.* That, of course, is what happened in this case, and *Birrell* therefore is not in conflict with the decision below.

United States v. *Soriano*, 482 F.2d 469 (C.A. 5), cited by petitioner (Pet. 20), was reversed after a rehearing *en banc*. 497 F.2d 147 (C.A. 5).

tects against the "forcible and compulsory extortion" of information from the accused himself. *Boyd* v. *United States*, 116 U.S. 616, 630. See also *Couch* v. *United States*, 409 U.S. 322, 328. Here, petitioner was not "compelled" in the Fifth Amendment sense to produce any information against his will: the records at issue already were in the hands of the authorities, having been lawfully seized by them. No legitimate value underlying the Fifth Amendment privilege would be served by denying the government their use at trial.[9] The records were incriminating,

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[9] While papers were involved in this case, as in *Boyd*, there was no requirement here that petitioner authenticate the documents by producing them, thereby possibly incriminating himself by the mere act of production. Because the papers were seized rather than obtained through subpoena or summons, petitioner himself was not compelled or otherwise required to disclose, produce or authenticate them; accordingly, the Fifth Amendment is not implicated. See 8 Wigmore, *Evidence* § 2264 (McNaughton rev. 1961). As the Sixth Circuit said in *United States* v. *Blank*, 459 F.2d 383, 385, certiorari denied, 409 U.S. 887:

> We believe that there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant.

For this reason, *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, relied upon by petitioner (Pet. 27), do not support his argument. Those cases involve the total failure to pay the occupational and excise taxes and to fill out the required tax forms on grounds of the privilege against self-incrimination.

but that cannot serve as a basis for excluding them from evidence. Most evidence obtained through a lawful search and seizure and later introduced at trial is incriminating.

Moreover, gambling records of the type at issue here are not the kind of material within the ambit of the Fifth Amendment privilege because they are not testimonial or so intimately personal as to enjoy the protection of the privilege. Such records contain no information of a distinctly private nature; the personal thoughts and opinions of an individual are not involved. As this Court stated in a related context in *Stanford* v. *Texas*, 379 U.S. 476, 485 n. 16: "A 'book' which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from * * * books * * * [that reflect thoughts, opinions, beliefs, or mere predilections of their possessors]." Thus, the courts of appeals have consistently held that the seizure of records of an illegal business such as gambling and the introduction into evidence of those records do not violate the Fifth Amendment. See, *e.g.*, *United States* v. *Blank*, *supra*; *United States* v. *Hanon*, 428 F. 2d 101, 106-107 (C.A. 8), certiorari denied, 402 U.S. 952; *United States* v. *Clancy*, 276 F.2d 617, 629-631 (C.A. 7), reversed on other grounds, 365 U.S. 312; see also *United States* v. *Scharfman*, 448 F.2d 1352, 1355 (C.A. 2), certiorari denied, 405 U.S. 919. The governing constitutional standard in such situations is not the Fifth Amendment privilege against self-incrimination but the reasonableness re-

quirement of the Fourth Amendment. Cf. *Schmerber* v. *California*, 384 U.S. 757, 767. That standard, as we have shown, has been met here.

As the Sixth Circuit said in *Blank* about the seizure of gambling records (459 F.2d at 386-387):

> 1) The subjects of the seizure are not personal communications at all but rather business accounts rendered extraordinary only by the fact that the business is itself illegal.
>
> 2) These are not privately recorded and privately held thoughts or descriptions of events, as in the case of a closely held diary, but rather business records of which other persons must have knowledge. [Footnote omitted.]

The court in *Blank* therefore concluded, in language appropriate here (*id.* at 387):

> In summary we feel that appellant was not "compelled" to produce these papers in violation of the Fifth Amendment; that the papers are not communicative in nature; that the papers are business records rather than personal and private writings; and that they are on their face instrumentalities of the crime with which appellant is charged. So viewed, they are subject to seizure under [the] Fourth Amendment * * * and having been so seized, should not have been suppressed.[10]

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[10] Petitioner relies (Pet. 24-25) upon *Hill* v. *Philpott*, 445 F.2d 144 (C.A. 7), certiorari denied, 404 U.S. 991, and *Vonder Ahe* v. *Howland*, 73-1 U.S.T.C. 9333 (C.A. 9). While we disagree with *Hill*, as our certiorari petition in that case stated, the case is distinguishable. Whatever special protection might possibly be invoked under the Fifth Amendment with respect

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1975.

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to an otherwise permissible seizure of a physician's tax records as in *Hill*, it does not follow that the business records of an illegal gambling operation are entitled to similar protection.

As to *Vonder Ahe* v. *Howland*, the opinion originally issued —upon which petitioner relies—was withheld from publication pending rehearing and ultimately was withdrawn. On rehearing, the Ninth Circuit held that "appellant's Fifth Amendment contention is premature. Resolution will depend upon facts and developments not before us at this time." *Vonder Ahe* v. *Howland*, 508 F.2d 364, 371.

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